Supreme Court, U.S.
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No. 90-1355

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THAKORBHAI L. PATEL,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION TWO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment protects the conduct of an individual who orally advises a prostitute of an imminent arrests by an undercover officer, so that the prostitute may try to avoid arrest by fleeing from the police.

LIST OF PARTIES

Petitioner, Thakorbhai L. Patel, is on probation, and is at liberty from a commitment of 90 days in the San Bernardino County Jail pending appeal. The People of the State of California are represented by Attorney General Daniel E. Lungren.

OPINION BELOW

Petitioner seeks a writ of certiorari to review an unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Two. (*People of the State of California v. Thakorbhai L. Patel*, (Case E007180).) The opinion is attached to the petition as Appendix 1.

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STATEMENT OF THE CASE

On May 16, 1989, the District Attorney of San Bernardino County filed an amended information in the consolidated proceeding of SCR 47384 and SCR 48604, which charged petitioner with violation of California Penal Code section 266i (pandering, count one), California Penal Code sections 664/266h (attempted pimping, count two), California Penal Code section 266h (pimping, count three), California Penal Code section 316 (maintaining a disorderly house, count four, a misdemeanor) and California Penal Code section 148 (obstructing an office in the discharge of the duties of that office, count five, a misdemeanor). (CT 207-209.) Petitioner pled not guilty. (CT 205.)

Jury trial began on May 16, 1989, and petitioner was found guilty as charged on all counts. (CT 205, 214-219, 290-294.)

On August 31, 1989, pronouncement of judgment was withheld and petitioner was granted supervised probation for three years on condition he serve 90 days in county jail, to be served on weekends. (CT 304-306.) Petitioner's motion to post bail pending appeal was granted. (CT 309.)

On September 11, 1990, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed petitioner's conviction. On November 28, 1990, the California Supreme Court denied petitioner's petition for review. Two justices voted to grant review, although the record does not show whether they voted to hear the case on the ground raised by the petition to this Court. (Appendix 2 to Petition.)

STATEMENT OF FACTS

On February 10, 1988, Jo Ann Miller, a San Bernardino County Deputy Sheriff, was working undercover. She was posing as a prostitute as part of the investigation of the Palms Motel. The motel was located at 3424 Cajon Boulevard in San Bernardino County. (RT 155-156, 186.) At 2:45 in the afternoon she went to the motel office and asked petitioner, who was behind the desk, if he had any rooms which she could rent for a short time. Petitioner said the minimal rental was for an hour. Miller rented a room for an hour for $10. She was not given a key to the room, nor was she asked to sign a registration form. (RT 158-160, 186, Exh. 23, p. 1.) Miller went into the motel room with Deputy Sheriff William Sheble for 15 to 20 minutes, then left and returned to the Sheriff's station for a briefing. (RT 159, 238.)

At about 5 p.m. another deputy, Lawrence Mosley, rented a room from petitioner for the evening for $35. To rent the room he completed a registration card. (RT 222-223.) From the room Mosley observed male and female couples entering motel rooms without luggage, staying approximately 30 minutes and leaving. (RT 225.) About an hour after he rented the room petitioner came to the room and told Mosley that it was his policy not to allow the curtains in his motel rooms to be open. (RT 226.)

Miller returned to the motel at about 5:00 that evening with Deputy Joe Miller, who was dressed in civilian clothes and remained in his truck. She rented a room from another individual who was at the clerk's desk for $10. She stayed in the motel room fifteen to twenty minutes with the deputy, then left. (RT 161-164, 167, Exh. 23, p. 2.)

Miller later returned to the motel with two reserve deputies. She went to the office to rent a room and petitioner asked how many people she had. She responded two, and petitioner said that she was not allowed to have more than one person with her in the room at any time. When she said she would have more than one person there at a time, petitioner said she would have to pay $10 per person. (RT 169-170, Exh. 23, p. 3.) She went back to the car to get more money, then returned, paid $20, and had a room rented to her. She did not sign a registration card. (RT 170-171.) The male deputies went into the room with Miller in sequence. Fifteen minutes after the second deputy went into the room, he and Miller left together in the same vehicle. (RT 174.)

At about 7 p.m. Al Barnett, a reserve officer acting in an undercover

capacity, went to the Palms Motel and asked petitioner if Miller had been there. (RT 198-200, Exh. 24, pp. 1-4.)

Miller returned to the motel shortly after 7:00 with another deputy, also dressed in civilian clothes. Petitioner said someone had been asking for her. He asked Miller if she had asked someone to meet her there at a certain time. She said that she did. She asked petitioner to describe the person, Barnett, and then she said he was a "high dollar" person. (RT 175, Exh. 23, pp. 5-6.) During this conversation petitioner came over to Miller and, as he talked to her, touched her around her bare midriff. (RT 178.) Petitioner rented her a room for one hour for $10. Again, she neither signed a registration card nor received a key to the room. (RT 176.) Miller and the deputy went into the room. (RT 179.) While they were in the room a buzzer went

off. She went outside the motel and saw Barnett with petitioner. (RT 179-180.)

Barnett asked petitioner if he would have to pay for the room, and petitioner responded that he would. (RT 181-182.) Barnett paid petitioner $10, then went into the room with Miller. (RT 182-183, 209, 211.) When the undercover officers left the motel room they arrested petitioner. (RT 183.)

On April 20, 1988, San Bernardino Deputy Sheriff Sheble was driving a van on Mt. Vernon Avenue in San Bernardino. Officer Lawrence Mosley, was a passenger in the vehicle. Emma Henderson waived at the vehicle and, when it stopped, she got into the van. Henderson solicited Sheble and Mosley for sex, and they agreed on a price of $15 per person. Sheble asked if she had a place where she comfortable in going. Henderson said Sheble had a bedroom on wheels, and

Sheble responded he wanted to take a little more time. He asked if she had a motel, and Henderson directed them to the Palms Motel. (RT 131-135, 227-228, 244-245, 255-256, 262-263.) Henderson had previously rented rooms at the motel from petitioner for prostitution. She would be charged $8 to $12 to use a room for one to two hours. (RT 137-139.)

At the motel Sheble told Henderson he did not want to be seen by the people there and expressed concern about registering. He asked her how much money was needed to rent a room, then gave her a five dollar bill and seven one dollar bills. (RT 245.)

When Henderson returned she began to suspect Sheble was a police officer. She started to walk down the street and Sheble drove after her. Sheble demanded to know what had happened to his money. Henderson replied she did not have

it on her and accused Sheble of being a police officer. Sheble convinced her that he was not an officer. She entered the vehicle and they returned to the motel. Henderson lead Sheble to room number five. They did not have a key, but the door was open. (RT 246-247.)

As they were standing at the motel room door, petitioner stepped out of his office and saw Sheble. He began to yell that Sheble was an undercover police officer.[1/] Petitioner demanded identification from Sheble and yelled "you're undercover. You're undercover." Henderson fled. Mosley pursued her and placed her under arrest. Petitioner was

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1. Henderson testified that when she attempted to rent the room petitioner told her Sheble was an undercover officer. However, it is unclear that petitioner would have been able to see Sheble at that time since petitioner was in the motel office and Sheble was in the van. (RT 140.)

arrested shortly thereafter. (RT 140-143, 227-228, 231-232, 248.)

DEFENSE

- Petitioner rested without putting on any evidence. (RT 273.)

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

The petition for writ of certiorari does not raise any issues that merit the exercise of this Court's discretionary jurisdiction. The decision of the Court of Appeal, Fourth Appellate District, was in full accord with the prior decisions of this Court, and the position advanced by petitioner borders on the frivolous.

ARGUMENT

I

A STATUTE WHICH IS DESIGNED TO PREVENT ANYONE FROM OBSTRUCTING AN OFFICER FROM THE PERFORMANCE OF DUTY IS NOT DIRECTED AT FREE SPEECH AND NEED NOT BE A SPECIFIC INTENT CRIME

In a two part argument, petitioner contends the trial court committed error by failing to instruct the jury that to find him guilty of obstructing an officer in the performance of duty, the jury would have to find that petitioner acted with that specific intent. He argues that absent such intent, petitioner engaged in a mere utterance which was protected by the First Amendment to the United States Constitution. (Pet., pp. 13-20.) Because California Penal Code section 148 is not directed at speech, the contention does not reach constitutional dimensions.

Petitioner was convicted of, *inter alia*, violating California Penal

Code section 148, a misdemeanor, which provided, in pertinent part, at the time of the offense:

> "Every person who willfully resists, delays or obstructs any public officer, [or] peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . is punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in a county jail . . . ."

The crime may be committed by conduct such as flight to avoid arrest (*In re Gregory S.*, 112 Cal.App.3d 764, 780, 169 Cal. Rptr. 540, 548 (1980)), physically attacking an officer (*People* v. *Powell*, 99 Cal.App.2d 178; 221 P.2d 178 (1950)), and harassing an officer so that the officer is unable to elicit information (*In re Joe R.*, 12 Cal.App.3d 80, 86; 90 Cal. Rptr. 530, 533 (1970)).

California Penal Code section 148 is a general intent crime, and thus no instruction on the specific intent with

which the act is performed is required. (*People* v. *Roberts*, 131 Cal.App.3d Supp. 1, 8-9; 182 Cal. Rptr. 757, 760-761 (1982).)

The jury was instructed that to establish a violation of Penal Code section 148, the prosecution would have to prove that petitioner "willfully resisted, delayed, or obstructed a peace officer . . . engaged in the performance of his duties." (RT 298.) The jury was further told that "[a] peace officer is discharging or attempting to discharge . . . his duties if he is making or attempting to make a lawful arrest or lawfully detaining or attempting to detain a person for questioning or investigation." (RT 299.) Thus the jury was aware that to convict petitioner, it would need to find that petitioner's conduct (i.e. shouting "you're undercover. You're undercover") was committed for the

purpose of obstructing the officer from arresting or detaining the prostitute. In this regard the prosecutor argued to the jury:

> ". . . [Petitioner] knew that Miss Henderson, being a prostitute, would have been arrested . . . . And so, by throwing out a couple of words indicating that [Sheble] was a police officer, words that she would understand, he knew that he could mess up the operation . . . .
>
> . . .
>
> ". . . [T]hat is where we get the charge of obstructing a police officer during the course of his investigation . . . ." (RT 309-310.)

From the instructions the court gave, and from the argument of the prosecutor, the jury was informed that to find petitioner guilty it would need to determine that the purpose of his conduct was to obstruct the officer in the performance of his efforts to arrest or detain Miss Henderson. They could not convict him solely on the basis that he spoke a few words.

Petitioner argues that application of California Penal Code section 148 to his conduct violates this Court's holding in *Houston* v. *Hill*, 482 U.S. 451; 96 L.Ed.2d 398; 107 S.Ct. 2502 (1987). Because the statute here is not directed at speech, petitioner is incorrect.

In *Houston* v. *Hill*, Hill had observed a friend intentionally stopping traffic on a busy street, apparently to enable a vehicle to enter traffic. Two police officers approached the friend and began speaking with him. Shortly thereafter Hill began shouting at the officers, in an attempt to divert an officer's attention from the friend. Hill first shouted "'Why don't you pick on somebody you own size?'" When the officer asked if Hill was interrupting him in his official capacity, Hill shouted "'Yes, why don't you pick on somebody my size?'"

(*Houston* v. *Hill*, *supra*, 482 U.S. at pp. 453-454; 96 L.Ed.2d at p. 398: 107 S.Ct. at p. 2502.)

Hill was prosecuted and acquitted of violating an ordinance of the city of Houston which provided:

> "(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." (Code of Ordinance, City of Houston, Texas § 34-11(a), quoted at *Houston* v. *Hill*, *supra*, 451 U.S. at p. 455; 96 L.Ed.2d at p. 408; 107 S.Ct. at p. 2506.)

Following his acquittal, Hill brought suit to have the ordinance declared unconstitutional both on its face and as applied to him.

Because the provisions of the ordinance making it unlawful for any person to assault or strike a police officer were preempted by the Texas Penal Code, the only portion of the ordinance at

issue was that directed at speech. (*Houston* v. *Hill*, *supra*, 451 U.S. at p. 460; 96 L.Ed.2d at p. 411; 107 S.Ct. at pp. 2508-2509.) This Court concluded that the ordinance was overly broad in that it provided the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them. (*Houston* v. *Hill*, *supra*, 451 U.S. at pp. 465-467; 96 L.Ed.2d at pp. 414-415; 107 S.Ct. at p. 2512.)

In his concurring and dissenting opinion in Houston v Hill, Justice Powell stated:

> ". . . I question the implication of the Court's opinion that the First Amendment generally protects verbal 'challenge[s] directed at police officers,' [citation]. A 'challenge' often takes the form of opposition or interruption of performance of duty. In many situations, speech of this type directed at police officers will be functionally indistinguishable from conduct that the First Amendment clearly does not protect. For example, I have no doubt that a

> municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt to engage the officer in conversation while the officer is directing traffic at a busy intersection. Similarly, an individual, by contentious and abuse speech, could interrupt an officer's investigation of possible criminal conduct. A person observing an officer pursuing a person suspected of a felony could run beside him in a public street shouting at the officer. Similar tactics could interrupt a policeman lawfully attempting to interrogate persons believed to be witnesses to a crime." (*Houston* v. *Hill*, *supra*, 482 U.S. at p. 479, 96 L.Ed.2d. at pp. 423-424; 107 S.Ct.at p. 2519, footnote omitted.)

In response, the majority opinion stated that the concern in Justice Powell's example was not contentious speech, but rather that the shouting and running in the hypothetical might physically obstruct the officer's investigation. The majority opinion stated that such conduct might constitutionally be punished under a

tailored statute that forbade individuals from physically obstructing an officer in the performance of duty, rather than under a broad statute aimed at speech. (*Houston v. Hill, supra*, 451 U.S. at p. 463, 96 L.Ed.2d at p. 412; 107 S.Ct. at p. 2510, n. 11.)

California Penal Code section 148 is a statute directed an forbidding individuals from physically obstructing an officer in the performance of official duties. Just as in the hypothetical set forth in Justice Powell's opinion, petitioner, by advising Henderson that Sheble was a law enforcement officer, was attempting to obstruct the officer from the performance of official duties, here by affording Henderson an opportunity to flee from arrest.[2/] Petitioner was not

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2. Petitioner urges that no duty was being discharged because Henderson was already in constructive police custody. (Pet., p. 14.) The Court of Appeal found the distinction petitioner

engaging in free speech, but instead, conduct designed to frustrate the officer in the performance of his duties.

Section 148 is not a statute aimed at speech. The reported decisions involving it deal almost exclusively with conduct. The particular conduct here was conduct (i.e. obstructing an arrest or investigation) manifested as words. The First Amendment does not immunize conduct because the conduct is manifested in words. (*Watts* v. *United States*, 394 U.S. 705, 707; 22 L.Ed.2d 664; 89 S.Ct. 1399,

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asserts unavailing:

> ". . . Without voicing our opinion whether the prostitute was indeed in constructive custody at the time of Patel's interference, we need only say that even if she was, this fact is irrelevant . . . . Obviously, [the officers'] overriding purpose was to investigate activities at Patel's motel and that operation was ongoing until Patel caused is premature termination." (Pet., Appendix 1, p. 14.)

1401 (1969) [statute prohibiting threats against the President is constitutional on its face]; *United States* v. *Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985), *cert. denied* 475 U.S. 1021; 89 L.Ed.2d 323; 106 S.Ct. 1211 [threat to retaliate against informant is not protected by the First Amendment]; *United States* v. *Kelner*, 534 F.2d 1020, 1025-1027 (2nd Cir. 1976), *cert. denied* 429 U.S. 1022; 50 L.Ed.2d 623; 97 S.Ct. 639 [threat to injure another is not protected by First Amendment].)

Petitioner's action was not speech manifested as conduct (e.g., *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503; 21 L.Ed.2d 731; 89 S.Ct. 733 (1969) [arm bands worn by high school students protesting the Vietnam war]; *Cohen* v. *California*, 403 U.S. 15; 29 L.Ed.2d 284; 91 S.Ct. 1789 (1971) [wearing a jacket in a courthouse that said 'Fuck

the draft"]), but conduct manifested as words. Conceptually it was no different than tackling the officer so he could not pursue Henderson, or driving a getaway car for the suspect. Such conduct would not be protected, and does not obtain constitutional protection by being manifested in words.

Consequently, California Penal Code section 148 differs from the ordinance invalidated in *Houston* v. *Hill* and is constitutionally sound as written.

Moreover, the evil addressed in *Houston* v. *Hill* was that the ordinance was an effort to criminalize speech directed at the officer. (fn. 11, *supra*; *Gooding* v. *Wilson*, 405 U.S. 518; 31 L.Ed.2d 408; 92 S.Ct. 1103 (1972) [statute which made it a crime for anyone to direct to another, in his presence, "opprobrious words or abusive language tending to cause a breach of the peace" found to be

overbroad in context of shouting at a police officer while picketing against the war in Vietnam].) The speech here was not directed at the officer, but at the suspect.

The balance of cases cited by petitioner concern protection of speech, rather than protection of conduct manifested as words. For example, *Terminiello* v. *Chicago*, 337 U.S. 1; 93 L.Ed. 1131; 69 S.Ct. 894 (1949), involved the suppression of controversial views under the rubric of a "breach of the peace" statute. In contrast, the entire thrust of the statute and the prosecution here was petitioner's conduct in obstructing an officer by warning a suspect that police were present.

Petitioner fails to raise any valid First Amendment issue and his petition should be denied.

II

PETITIONER HAS FAILED TO ESTABLISH THAT BECAUSE OF THE ALLEGED ERROR IN INSTRUCTING THE JURY ON HIS OBSTRUCTION CHARGE HE WAS DENIED A FAIR TRIAL AS TO THE OTHER OFFENSES FOR WHICH HE WAS CONVICTED

Petitioner also contends that the failure to give the instruction discussed in Argument I for the misdemeanor offense of obstructing an officer infected his convictions for three felonies and another misdemeanor. (Pet., p. 21.) Not only has petitioner failed to substantiate this claim, but he has failed to raise a constitutional issue.

Petitioner's basic position is that Penal Code section 148, as applied here, violated his rights under the First Amendment to the Constitution. He does not even claim that his conduct of pandering, pimping, attempted pimping and maintaining a disorderly house is similarly protected.

What he does instead assert is that "[a]ll verdicts were infected by what must have been confused and easily awry jury instructions" inasmuch as different definitions of intent were given for different crimes. (Pet., p. 21, emphasis added.) In fact the jury was properly instructed, since pandering and attempted pimping are specific intent crimes, and the jury was instructed on the required specific intent (RT 295, 297), while pimping and maintaining a disorderly house are general intent crimes and the jury was properly instructed on that element. (RT 294.) These are not confusing and "easily awry" instructions, these are the law. Moreover, the jury was told that each count charged a distinct crime which must be decided separately. (RT 301.)

The speculation that the jury was confused is unsubstantiated, and the

claim, in any event, does not raise a constitutional issue.

Petitioner's attempt to piggyback reversal of his four other convictions on his claim of denial of freedom of speech for a misdemeanor conviction should be recognized for what it is and dismissed.

CONCLUSION

For all of the reasons stated above, petitioner has failed to establish the existence of any issue which merits the grant of certiorari. The decision of the Court of Appeal was in accord with the Constitution and established precedent. Accordingly, the petition should be denied.

DATED: May 7, 1991

Respectfully submitted,

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No: 90-1355
October Term, 1990

THAKORBHAI L. PATEL,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have caused service of the within RESPONDENT'S BRIEF IN OPPOSITION as follows:

To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named below as follows: each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 7th day of May, 1991.

Dennis Tilton
Attorney at Law
234 N. Arrowhead Avenue
San Bernardino, California 92408

Stephen M. Kelly, Clerk
California Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth Street
San Bernardino, California 92401

There is a delivery service by United States Mail and/or courier service at each place so addressed or regular communication by United States Mail and/or courier service between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 7, 1991.

Lidia Villarreal
LIDIA VILLARREAL

Subscribed and sworn to before me this 7 day of May, 1991.

REGINA C. KAMHOLZ
Notary Public—California
County of San Diego
My Commission Expires 11/19/91

Regina C. Kamholz
Notary Public in and for said County and State